JUN 12 1967
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IN THE

Supreme Court of the United States

Term, 1967

No. 244

OLGA NATOLI, *Petitioner*

v.

MARGARET K. HAMILTON,
WILBUR H. HAMILTON, JR.
CONTINENTAL BANK & TRUST CO., successor to
BROAD STREET TRUST CO.

and

THE ESTATE OF WILBUR H. HAMILTON, *Deceased*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

OLGA A. NATOLI, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, entered in the above case on March 14, 1967.

OPINION BELOW

The opinion of the Supreme Court of Pennsylvania appears in 424 Pa. 643.

The opinion of the Supreme Court of Pennsylvania on Petitioner's Petition For Reconsideration or to Vacate Order is unreported. A copy of the said Opinion is printed in the Appendix herein, infra, Page .

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on March 14, 1967.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

QUESTIONS PRESENTED

1. Has due process under the Fourteenth Amendment of the Constitution of the United States been accorded to Petitioner who seeks to recover against the Executors of an Estate of a decedent, the sum of $25,000.00 on a simple debt alleged to be owed by the decedent to the Petitioner, where an action was commenced in the Court of Common Pleas where there was a demand for a jury trial which is a matter of right, and the Court of Common Pleas, affirmed by the Supreme Court of Pennsylvania, sustained Preliminary Objections on the ground that Petitioner should present her claim to the Orphans' Court of Philadelphia County, a Statutory Court, where the right to a jury trial is discretionary only, and the verdict of a jury may be disregarded by the Court?

2. Is the Petitioner denied her constitutional right to a jury trial on a simple action of debt against a decedent's Executors, where the right to a jury trial in actions of debt is preserved by Article I, Section VI of the Constitution of the Commonwealth of Pennsylvania and Amend-

ment VII of the Constitution of the United States when her claim is relegated to a Statutory Probate Court where the right to a jury trial is discretionary only, and the verdict of the jury may be disregarded as against her absolute right to a jury trial in a Court of Law on a pure legal action, as distinguished from an equitable proceeding?

STATEMENT

This is an assumpsit action in the Court of Common Pleas of Philadelphia County by the Petitioner against the Executors of the Estate of Wilbur H. Hamilton, deceased, to recover the sum of twenty-five thousand ($25,000.00) dollars by virtue of two loans to the decedent, made in the amounts of ten thousand ($10,000.00) dollars and fifteen thousand ($15,000.00) dollars respectively, during his lifetime. A jury trial was demanded.

Respondents filed preliminary objections raising the question of jurisdiction on the ground that the Orphans' Court, where an account had been filed by the Executors, has exclusive jurisdiction over the administration and distribution of the real and personal property of decedents' estates, including claims against decedents' estates.

The petitioner filed an answer to the preliminary objections denying that the Orphans' Court had exclusive jurisdiction over petitioner's claim, but averred that the Court of Common Pleas and the Orphans' Court had concurrent jurisdiction over the claim. Petitioner averred also that she had demanded a jury trial in the Common Pleas action which is a matter of right; whereas in the Orphans' Court a jury trial is discretionary with the Court. The Court below held that since an account had been filed in the Orphans' Court before the action in the Court of Common Pleas was filed that the Orphans' Court had jurisdiction as a matter of comity. Upon appeal, the Supreme Court of Pennsylvania affirmed the decision. A subsequent petition for reconsideration was denied.

REASONS FOR GRANTING THE WRIT

I. *The Court of Common Pleas has jurisdiction in a creditor's claim against the executors of a decedent's estate, where a jury trial has been demanded as a matter of constitutional right, as against the jurisdiction of the Orphans' Court where an account has been filed and where the right to a jury trial is discretionary only and where the jury's verdict may be disregarded by the Orphans' Court at its discretion.*

As pointed out in the statement, Petitioner had demanded a jury trial, which is a right guaranteed to her by both the Constitution of Pennsylvania (Article I, section 6, which states as follows: "Trial by jury shall be as heretofore, and the right thereof remain inviolate") and the Federal Constitution (Amendment 7 of the Constitution of the United States which reads as follows: "In Suits at Common Law where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the Rules of the Common Law").

This right to a jury trial is not extended to the Orphans' Court of Philadelphia which is a statutory court and can exercise only those powers specifically granted to it by statute. In certain cases, the Orphans' Court can order that a jury trial be had but the jury's decision therein is not binding upon the court. The grant of a jury trial by the Orphans' Court is purely discretionary and no party litigant can demand a jury trial as a matter of right. In *Holtz Will*, 422 Pa. 540, 543-544, decided September 27, 1966, this court stated:

> "The practice and procedure in the case at bar is governed by the Act of July 14, 1961, P.L. 610 §1, 20 P.S. §2080.745. Prior to the passage of that statute, an Orphans' Court had the power to dispose of an appeal from the probate of a testamentary instrument in the

following manner: (a) if the dispute of fact concerning the validity of the writing alleged to be testamentary was *substantial*, then the court was under a *statutorily-mandated* duty to award the parties a trial by jury and (b) if the dispute of fact was *not substantial*, then the court could refuse a jury trial and either (1) sustain or (2) declare invalid the testamentary writing. See: *Murray Will*, 404 Pa. 120, 124-129, 171 A. 2d 171; *Hunter Will*, 416 Pa. 127, 136, 137, 205 A. 2d 97. Under such prior law when a party was *statutorily* entitled to a trial by jury or when the Orphans' Court, *in its discretion*, awarded a jury trial, then the statute provided that 'the verdict [of the jury] shall be conclusive only if the court is satisfied with the justness of it on the basis of all the evidence. If the court is not so satisfied, it may set aside the verdict, grant a new trial, or enter such other judgment as satisfies its conscience.' See: Act of August 10, 1951, P.L. 1163, as amended by the Act of February 10, 1956, P.L. (1955) 1022 §§745(a), 745(d).

"However, the Act of 1961, supra, has changed the law in this respect. The statute now provides that: '(c) Will Contest and Other Matters. When a contest shall arise concerning the validity of a writing alleged to be testamentary . . . , the court, in its discretion at any stage of the proceedings, may impanel a jury to decide any question of fact *but the verdict of the jury shall be* advisory only.': Act of July 14, 1961, P.L. 610 §1, 20 P.S. §2080.745(c). (Emphasis added). As a result of this change in the statute there is no *statutorily-mandated* right to a trial by jury in a will contest; the impanelling of a jury lies solely within the discretion of the chancellor. Moreover, since a jury verdict is now advisory only, the refusal of the chancellor to impanel a jury does not constitute an abuse of discretion. *Hunter Will*, supra, at p. 137. See also: *Abrams Will*, 419 Pa. 92, 96, 97, 213 A. 2d 638.

"By reason of the advisory status now accorded by the legislature to a jury verdict in a will contest, a chancellor is now free to accept or reject in whole or in part, the verdict of a jury. (Cf. *Dettra Will*, 415 Pa. 197, 202 A. 2d 827). In the case at bar, the chancellor, in rejecting the verdict of the jury that the will and codicils were forged, was acting within his statutory power, i.e., acting in the capacity of the ultimate fact-finding tribunal." (Emphasis by the Court.)

There is no quarrel with the respondents' contention that the Orphans' Court has exclusive jurisdiction over the administration and distribution of the real and personal property of decedents' estates. However, the respondents' assertion that a creditor's claim against an estate is solely within the jurisdiction of the Orphans' Court is completely in error.

The law is clear that both the Common Pleas Court and the Orphans' Court have concurrent jurisdiction over creditors' claims against a decedent's estate. As is well stated in *Probst et al. v. First National Bank of Williamsport*, 73 D. & C. 317 (1950), at pages 318-319:

"We begin consideration of this question with the premise that the court of common pleas has concurrent jurisdiction with the orphans' court in the proof of creditors' claims: Sergeant v. Ewing, 30 Pa. 75, 36 Pa. 156; Pringle v. Pringle, 130 Pa. 565. The orphans' court has exclusive jurisdiction of the distribution of decedents' estates and in order to recover a claim reduced to judgment in the common pleas court, claimant must go to the orphans' court: Strouse v. Lawrence, Admx., 160 Pa. 421; Petillo v. Perry, Exec., et al., 48 D. & C. 473. A common pleas judgment is conclusive, however, when presented in the orphans' court for payment. A finding in the orphans' court is also conclusive when presented in a common pleas action: McClain's Est., 180 Pa. 231; Commonwealth, to use, v. Easton Trust Co., Exec., 347 Pa. 162.

"The remedy of the creditor to establish his debt in the common pleas court was not taken away when the orphans' court was established. In certain cases it is necessary for the creditor to establish his debt in the common pleas court to stop the running of the statute of limitations. The common pleas court has been preferred to decide disputed and complicated questions. In Philips, Admr., v. Railroad Co., 107 Pa. 465, it was said:

"'The result of the authorities seems to be that as to the claims of distributees and legatees the jurisdiction of the orphans' court is exclusive and that of the common pleas is ousted, while as to creditors, the right to proceed by a common law action for the determination of their claims is concurrent with the right to proceed in the orphans' court.'

"It was ruled in Ohio v. Union Trust Co. of Pittsburgh, Exec., 137 Pa. Superior Ct. 75, as follows:

"'Any creditor of a decedent, who holds a valid claim, not barred by limitation, may bring his action in the court of common pleas against the legal representative and have it reduced to judgment—provided the representative has not been discharged from his trust—wholly irrespective of whether the assets of the estate have been distributed or not.'"

The Orphans' Court of Philadelphia (per Klein, P.J.) has confirmed this concurrent jurisdiction by stating in *Malvestuto Estate*, 25 D. & C. 2d 686, 690 (1962):

"The Court of Common Pleas has concurrent jurisdiction with the Orphans' Court in proof of creditors' claims against the estates of decedents and a judgment obtained in the Court of Common Pleas is conclusive in the Orphans' Court: Commonwealth, to use, v. Easton Trust Co., 347 Pa. 162 (1943); Schauble Estate, 350 Pa. 151 (1944)."

There is no Pennsylvania case which directly rules on the question presented in the case at bar, with respect to the question of the jurisdiction of a Court of Common Pleas because of the demand for a jury trial, as a matter of right, as opposed to the jurisdiction of the Orphans' Court where a jury trial is discretionary with the Court and, even if granted, the court may disregard it.

The Supreme Court of Pennsylvania did hold that a Federal Court did not have jurisdiction where a state court had control of a trust estate for 27 years, had appointed the trustees and one account had been confirmed and two others were pending, exceptions having been filed to them. *Thompson v. Fitzgerald*, 329 Pa. 497 (1938), affirmed in *Princess Lida v. Thompson*, 305 U.S. 456.

The *Thompson* case, however, is distinguishable from the instant case in that while an account was filed, suit in the Court of Common Pleas had been instituted in the instant case before it was listed for audit. Counsel for the Executors had also been previously advised, prior to the filing of the account, that suit was intended to be filed in the Court of Common Pleas upon this claim unless it was paid.

The mere filing of an account should not deprive the petitioner of her constitutional right to a jury trial in a court of concurrent jurisdiction.

Under the circumstances, the law is clear that a creditor has the right to file a suit against the estate of a decedent in the Court of Common Pleas, as well as to file a claim in the Orphans' Court. But he has that choice.

The petitioner in this case has exercised her choice in filing a suit in the Court of Common Pleas and has demanded a jury trial. This right cannot be taken from her.

II. *The right to trial by jury in actions of debt, as in the instant case, existed at the time of the adoption of the first Constitution of the Commonwealth of Pennsylvania in 1776, Clause Eleventh of the Declaration of Rights and Sec. the Twenty-Fifth of the plan or frame of government; the Constitution of 1790, Article IX, Sec. 6; Constitution of 1838, Article IX, Sec. 6, and the Constitution of 1874, Article I, Sec. 6, and the denial of the right to a jury trial is a violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.*

In the annotation of Purdon's Statutes, Constitution to Article I, Sec. 6, which reads, "Trial by jury shall be as heretofore, and the right thereof remains inviolate", there is stated, "Eleventh: That in controversies respecting property, and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred." * * * "Section the Twenty-Fifth. Trials shall be by jury as heretofore; And it is recommended to the legislature of this state, to provide by law against every corruption or partiality in the choice return, or appointment of juries." "The eleventh clause, of the Constitution of 1776, above quoted, is limited to controversies respecting property and suits between man and man, which are civil causes. But the twenty-fifth section of the same Constitution, and section 6, of Article I of the Constitution of 1873 (Art. IV, sec. 6 of the Constitutions of 1790 and 1838), are general, and the 'Trials by Jury' referred to therein apply to both civil and criminal cases." It is to be noted however, that it is the right to a trial by jury which is to remain inviolate in Constitution of 1790, 1838, and 1873; and it is the right of the parties in a civil action to a trial by jury, which ought to be held sacred, which was secured under the Eleventh Clause of the Constitution of 1776.

"2. Construction and application

This section must be construed with reference to the statutes and usages that were in force in England,

and in the province of Pennsylvania, at the adoption of the first state constitution. Byers v. Com., 42 Pa. 89, 1862; Rhines v. Clark, 51 Pa. 412, 1866, affirming 6 Phila. 62, 22 L. I. 357; Com. v. Saal, 10 Phila. 496, 30 L. I. 194, 5 Leg. Op. 21, 21 Pitts. 5, 1873."

"The Frame of the Government", as published in the "Charter to William Penn and Laws of the Province of Pennsylvania, (1879)", In paragraph "sixth", it is provided that: "That in all courts all persons of all persuasions may freely appear in their own way, and according to their own manner and there personally plead their own cause themselves, or, if unable, by their friends". Further in Sec. "Eight" there is provided: "That all trials shall be by twelve men, and as near as may be peers or equals and of the neibourhood and men without just exception".

In "The Great Law or the body of Laws", approved December 7, 1682, the following provision appears, "Chapter XXXVIII." "And be it etc. That all tryalls in civil cases shall be by twelve men and as neer as may be Peers or equally and of the neighbourhood, and men without exception."

In an act of assembly approved March 10, 1683, the following chapter was approved: "Chap. LXIV. Be it enacted &c. That no Freemen within this Province of Pennsylvania or territories thereof, shall be taken or imprisoned, or Dispossessed of his freeholds, or liberties, or be Outlawed, or Exiled, or any other wise hurt, Damnified, or Destroyed, nor shall hee be tryed or Condemned but by the lawful Judgement of his equalls, or by the Laws of this Province and territiories thereof."

In the same sessions, the following appears: "Chap. LXX. Be it Enacted by the Authority aforesaid, and it is hereby Enacted, That all actions of debt, Accompt, or Slander, and all actions of Tresspass, shall be henceforth first tryed by there respective County Court, where the Cause of action did arise."

In laws approved by the Assembly and promulgated by the Governor the following appears; "*25. The Law About Trials By Twelve Men.* . . . Be it Enacted by the Authority aforesaid, That all trials in Civil Cases shall be by twelve men, and as neer as may be peers or equalls & of the neibourhood & men without just exception."

It can thus be seen that long before the first Constitution of the Commonwealth of Pennsylvania was enacted in 1776, the trial by jury in actions of debt was firmly intrenched in the laws of Pennsylvania. This continued up until the adoption of the first Constitution in 1776 and was continued thereafter in the Constitutions of 1790, the Constitution of 1838, and is contained in Article I, Sec. 6 of the Constitution of the Commonwealth of Pennsylvania approved in 1874, presently enforced.

The early law above referred to also contained references of the trial of actions of debt in the court of common pleas. No such right of trial by jury can be found in the creation of Orphans' Courts. The creation of Orphans' Courts is purely statutory and nowhere is the right to a trial by jury created as a matter of right. In *Orban v. Rothrock*, 19 D. & C. 2d 336 Pa. (1959), the court dismissed a preliminary objection which objected to the jurisdiction of the court of common pleas in an action for the enforcement of a contract between the plaintiff and a decedent. The court said:

> "Defendant has cited no authority for its first point and our experience in adjudicating many claims against decedents' estates convinces us that no such authority can be found.
>
> "Plaintiff is not seeking title to any estate asset nor specific performance of a contract but is seeking damages for breach of his contract with decedent. This is not within the exclusive jurisdiction of the orphans' court as outlined in section 301 of the Orphans' Court Act of August 10, 1951, P. L. 1163, as amended, 20 PS §2080.301. See Pringle v. Pringle, 130 Pa. 565; Com-

monwealth to use v. Easton Trust Company, 347 Pa. 162, and Petillo v. Perry, 48 D. & C. 473."

In *Probst v. The First National Bank of Williamsport*, 73 D. & C. 317 (Pa. 1950), where a creditor sued the executor of an estate in the court of common pleas and an objection was made that the orphans' court had sole jurisdiction, the court said:

"It is argued, however, that even though there is concurrent jurisdiction between the orphans' and common pleas courts in this case, plaintiffs, because they filed objections to the account in the orphans' court before they started the common pleas lawsuit, must now first establish their claim in the orphans' court.

"With this we cannot agree. In Doyle's Estate, 291 Pa. 263, it was said that two suits between the same parties upon the same cause of action would not be tolerated and the court directed that the parties proceed on the action first started. The question in Doyle's Estate, however, was merely as to whether or not the parties were to proceed on partition proceedings in the orphans' court or the common pleas court. There was little difference in the proceedings, no matter in which court the case was carried to a conclusion.

"In the instant case plaintiffs' creditors have the benefit of jury trial by proceeding in common pleas court. This benefit should not be taken away from them just because they have to protect their right to collect against the personal property by excepting to the account as filed in the orphans' court. There has been a tendency not to deprive any one without his express or implied consent, of the right to trial by jury on the question of ownership of property where a substantial dispute exists on the issue; Williams' Estate, 236 Pa. 259. We are loath to make an order depriving these plaintiffs of their right to trial by jury."

In *Low v. Ahlquist*, 28 Lehigh County Law Journal, Page 455, Judge Koch, of the Lehigh County Court of Common Pleas sustained preliminary objections to a complaint in equity by an executor of an estate who sought to recover Two Thousand ($2,000.00) dollars representing a loan made by decedent to the defendant and also to recover certain personal property. The case was certified to the law side of the court. The court said:

> "We find in plaintiff's complaint no averment of fraud or other ground which warrants relief in equity and under the facts pleaded he has an adequate remedy at law. Cf. Davis et al., Executors v. Republic Trust Co., 270 Pa. 447. There is no averment that there is unique value and even in this event upon an action of replevin relief might be granted if the court is called upon to impound the property under Pa. R. C. P. 1079 (b) (1). See Goodrich-Amram, Procedural Rules Service, Sec. 1079 (b) (1).
>
> "We are of the opinion that the plaintiff's rights are purely legal in nature and even if this were doubtful, we would be obliged to resolve the doubt in favor of the defendants who demand a jury trial. Lackawanna Ice Co. v. Weingartner, 328 Pa. 362."

In the decisions in both the *Probst* and *Low* cases, the court follows the Constitution in its protection of the right of a jury trial. This is the law of the land and should remain inviolate.

In *Rybak Appeal*, 424 Pa. (opinion attached to Appendix), decided by the Supreme Court of Pennsylvania the same day as the instant case, the court said:

> "In the factual posture in which this matter was presented the court below before it could pass upon the claimant's petition had to resolve the question whether the claimant was indebted to the estate. Since jurisdiction to determine the existence or validity or a debt allegedly due to the estate was not in the Orphans'

Court (3) the court below exceeded its jurisdiction in determining that claimant was not a debtor of the estate." [4]

In note 3, referring to this paragraph, the court said: "The right to a trial by jury is involved in this jurisdictional question."

The *Ryback* case, although decided the same date as the instant case, was not published in The Legal Intelligencer, the legal periodical of Philadelphia County, until April 26, 1967. Hence a timely petition for re-argument within 10 days of the decision could not be made. However, a Petition for Reconsideration and for Vacation of the Order was filed and was denied.

The right to a jury trial is the retention of the historic separation of functions between a Judge and a jury. The denial of a jury trial to the Petitioner is a denial of the fundamental right to a jury trial which existed at the time of the adoption of the first Constitution of the Commonwealth of Pennsylvania in 1790 and ever since under the succeeding Constitutions, including the Constitution of 1874 which presently governs, *William Goldman Theaters v. Dana*, 405 Pa. 83.

The Seventh Amendment of the Constitution of the United States constitutionally guarantees the right to a jury trial as it existed in its fundamental elements as part of the common law of England as of the time the Amendment was adopted. The purpose of the Amendment was to preserve the substance of the common law right to trial by jury. This was the same purpose which motivated inclusion of Article I, Section 6 in the Constitution of the Commonwealth of Pennsylvania.

A claim of debt is not an equitable action. It is action of law, to which is attached the right to a jury trial. *Fleming's Estate*, 265 Pa. 399 (1919).

As the court well expressed in *United States v. Jepson*, 90 F. Supp. 983 at p. 986:

"It is my thought that when a federal statute embraces a common-law form of action, that action does not lose its identity merely because if finds itself enmeshed in a statute.

"The right of trial by jury in an action for debt still prevails whatever modern name may be applied to the action. To hold otherwise would be to open the way for Congress to nullify the Constitutional right of trial by jury by mere statutory enactments. It is by such methods that courts lose their power to enforce the Bill of Rights."

The deprivation of Petitioner's absolute right to a jury trial, whose verdict would be binding upon the court, was a denial of due process of law under the Fourteenth Amendment of the Constitution of the United States.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB J. KILIMNIK
Counsel for Petitioner

ALEXANDER OSINOFF
Of Counsel

APPENDIX A

IN THE
SUPREME COURT of PENNSYLVANIA
EASTERN DISTRICT

January Term, 1966 No. 410

OLGA NATOLI, *Appellant*

vs.

MARGARET K. HAMILTON, WILBUR H. HAMILTON, JR., CONTINENTAL BANK & TRUST CO. successor to BROAD STREET TRUST CO. and THE ESTATE of WILBUR H. HAMILTON, Deceased

Appellees

PETITION FOR RECONSIDERATION OR TO VACATE ORDER

HISTORY OF CASE

To the Honorable, the Chief Justice and Justices of the Supreme Court:

The Petition of Olga Natoli, Appellant, in the above entitled case, by her attorneys, Alexander Osinoff, and Jacob J. Kilimnik, respectfully represents:

1. The above case was an appeal from the action of the Court of Common Pleas granting appellee's preliminary objections to appellant's complaint in assumpsit seeking to recover the sum of $25,000.00 loaned to the decedent on the ground that the Orphans' Court had acquired jurisdiction by the filing of an account prior to the commencement of the Court of Common Pleas proceeding despite the fact that appellant had demanded a jury trial as a matter of right in the Court of Common Pleas action.

2. On March 14, 1967, this court affirmed the decision of the court below in a Per Curiam decision.

3. On the same date, this court reversed a decision of the Orphans' Court of Bucks County holding that the Orphans' Court did not have jurisdiction of an alleged debt by one of the heirs to a decedent's estate, particularly where the right of a jury trial was involved in the jurisdictional question. (Ryback Estate, Supreme Court of Pennsylvania, January Term, 1967, No. 42,) (published in The Legal Intelligencer on April 26, 1967.) A copy of this decision is attached hereto.

4. In Ryback, this court stated:

"In McGovern's Estate, 322 Pa. 379, 186 Atl. 89 (1936), this court held that the Orphans' Court has no jurisdiction to compel a third person, not associated with the administration of the estate, to pay over money or property in the possession of the third person to the estate where the money or property was not in decedent's possession when he died, or subsequently in the possession of decedent's representative and that, under such circumstances, decedent's personal representative must seek his remedy by action at law or in equity. See also Brown's Estate, 343 Pa. 230, 22 A. 2d 821 (1941) Moreland Estate, 351 Pa. 623, 632, 42 A. 2d 63 (1945).

In the factual posture in which this matter was presented, the court below, before it could pass upon claimant's petition, had to resolve the question whether claimant was indebted to the estate. Since jurisdiction to determine the existence or validity or a debt allegedly due to the estate was not in the Orphans' Court, [3] the court below exceeded its jurisdiction in determining that claimant was not a debtor of the estate.[4]

While we sympathize with the court below in its desire to expedite the disposition of this matter, unfortunately, the procedure adopted led to an excession of jurisdiction by the court and the record must be re-

manded to the court below. Determination of claimant's petition must await resolution of the issue whether claimant was indebted to the estate, and such question must be resolved in a tribunal other than the Orphans' Court.

5. The opinion of this court in Ryback, in footnote 3 of its opinion stated: "the right to trial by jury is involved in this jurisdictional question".

6. The opinion of this Honorable Court in Ryback is completely adverse to this Honorable Court's affirmance of the decision of the Court of Common Pleas in the instant case in sustaining Preliminary Objections to the Complaint in Assumpsit seeking to recover a debt owed to the appellant by the decedent. The question presented in the instant case comes under the umbrella of the Ryback decision because, if the Orphans' Court has no jurisdiction to determine the question as to whether a debt is owed to an estate of a decedent, then it follows logically and unequivocally that the Orphans' Court does not have jurisdiction to determine a claim owed by a decedent to a third person, particularly, where, as the appellant in the instant case, has demanded a jury trial in the Court of Court Pleas. The fundamental and absolute right to a jury trial guaranteed by the State and Federal Constitutions, in addition to the lack of statutory jurisdiction to determine a claim of debt against a decedent as set forth in the Ryback case, require that the decision of this Honorable Court in the instant case be reconsidered and scheduled for re-argument, or the decision of this Honorable Court in the instant case of March 14, 1967, should be vacated.

7. The attention of this Honorable Court is also called to the case of *Gribbel v. Donoian*, 193 Pa. Superior Ct. 445 (1960), where the Superior Court stated:

"But it is equally obvious to my understanding, that the legislature cannot constitutionally impose any

> provisions substantially restrictive of the right of a trial by jury. They may give existence to new forums; they may modify the powers and jurisdiction of former courts, in such instances as are not interdicted by the constitution from which their legitimate powers are derived. Still, the sacred inherent right of every citizen, a trial by jury, must be preserved. 'It shall remain inviolate, as heretofore.' "

The attention of this Honorable Court is also called to the case of *Booz v. Reed*, 13 D & C 2d 283. There the court stated:

> "It is pertinent to inquire, then, what was the right of trial by jury as it existed at the time of the adoption of the Constitution of 1874? The Act of March 20, 1810, P. L. 208, 5 Sm. L. 161, sec. 4, 42 PS Sec. 662, gave either party the right to appeal. The appeal was de novo. Section 3 of the Act 42 PS Sec. 661, provided that if the demand shall not exceed, $5.33, the judgment shall be final. For an interesting and illuminating review of the historical background of this legislation, see Emerick v. Harris, 1 Bin. 416, 426; Capital Traction Co. v. Hof, 174 U. S. 1, 19 S. Ct. 580, 43 L. Ed. 873. Section 4 of the same act 42 PS Sec. 923, provides, inter alia: . . ."
>
> "Thus, at the time of the adoption of the Constitution, there was the right of appeal and trial by jury if the demand exceeded $5.33."

The appellant, in the instant case, did not submit to the jurisdiction of the Orphans' Court but appeared by counsel at the audit and requested that sufficient funds be set aside by the Orphans' Court to cover any verdict in the Court of Common Pleas action. Without taking any action upon this request, the Orphans' Court continued the audit pending determination of Common Pleas Court action.

WHEREFORE, your Petitioner, by her attorneys, Alexander Osinoff and Jacob J. Kilimnik, respectfully prays this Honorable Court to grant a reconsideration of its decision rendered on March 14, 1967, or to vacate its Order affirming the lower court's decision.

And your Petitioner will ever pray, etc.

/s/ ALEXANDER OSINOFF, Esquire
/s/ JACOB J. KILIMNIK, Esquire

Attorneys for Appellant

APPENDIX B

IN THE
SUPREME COURT of PENNSYLVANIA
EASTERN DISTRICT

No. 42 January Term 1967

IN RE: ESTATE OF EVA RYBAK, Deceased

Appeal of William Rybak, Jr.

Appeal from Decree of the Orphans' Court of Bucks County, No. 38599.

Entered April 15, 1966

OPINION

JONES, J. FILED: March 14, 1967

Eva Rybak, [decedent], a Bucks County resident, died, intestate, on May 7, 1964, survived by her husband and three adult children. No letters of administration in her estate have been requested or issued.

On November 29, 1965, Mary Rybak, decedent's daughter, [claimant], proceeding under the Fiduciaries Act of 1949, §§202, 212,[1] petitioned the Orphans' Court of Bucks County alleging: (a) decedent had resided with claimant from 1956 until her death and that the $1000 family exemption was payable to claimant; (b) decedent's sole assets at the time of her death consisted of (1) U. S. Government bonds valued at $1,041.08 and (2) bank accounts in the names of decedent and claimant, as joint tenants with

[1] Act of April 18, 1949, P.L. 512 art. II, Section 202, as amended by the Acts of February 23, 1956, P.L. (1955) 1084, Section 2, of November 10, 1959, P.L. 1450, Section 1, 20 P.S. 320.202 and of April 18, 1949, P.L. 512, art. II, Section 212, 20 P.S. 320.212. Section 202 provides for the settlement of small estates of a gross value not exceeding $2,500 whereas Section 212 provides for the payment and delivery of the so-called "family exemption".

right of survivorship, totalling $4,419.29; (c) that claimant had paid decedent's funeral and medical expenses and other debts, including the Pennsylvania inheritance tax; (d) decedent's entire estate was less than $2500. The prayer of the petition[2] was that the court direct distribution to the claimant of the U. S. Government bonds in payment of the family exemption and as a partial reimbursement to claimant of decedent's debts paid by her.

William Rybak, Jr., one of decedent's surviving sons, [exceptant], filed exceptions to the claimant's petition alleging that, in addition to the assets set forth in the petition, claimant was indebted to the decedent in an amount in excess of $11,000 and, therefore, decedent's estate could not be settled by a petition under the Fiduciaries Act of 1949, supra, §§202, 212 but only after a proper administration of the estate. The Orphans' Court of Bucks County took testimony and, after the taking of such testimony, granted the prayer of claimant's petition, overruled the exceptions filed thereto and directed distribution of the U. S. Government bonds to claimant as a family exemption and on account of her claim as a preferred creditor of decedent's estate. From that decree the present appeal was taken.

Even though the court below actually determined this matter on its merits, the court noted that it neither approved nor sanctioned the procedure adopted. The court below further noted: (1) that, if it were to uphold the exceptions and deny claimant's petition, such action as a practical matter would accomplish nothing toward the actual collection of the alleged loan for the benefit of decedent's estate and would only result in repetitious litigation; (2) that, if the exceptions were not upheld and the prayer of the petition granted, other parties in interest, such as possible creditors, in decedent's estate would not be bound by the court's determination and its action as to them would be interlocutory. Nevertheless, the court decided the matter on its merits and ruled that, if decedent had made a

[2] Decedent's husband and one of her two sons joined in this petition.

loan to claimant, such loan would be barred by the statute of limitations.

A brief recitation of the factual background from which the alleged indebtedness arose is essential. Some years prior to decedent's death, decedent and her husband had separated. On October 12, 1955, she and her husband had entered into a written property settlement under the terms of which the family farm was to be sold and the proceeds divided equally between decedent and her husband, the farm equipment, livestock, etc., were to be sold and the proceeds divided equally between decedent, her husband and their three children and decedent and her husband mutually agreed to release their respective interests in each other's estate. On February 14, 1956, claimant purchased the farm property for $11,500 and exceptant contends that decedent loaned claimant the money to effectuate the purchase of the farm and that, shortly after the family settlement, claimant acknowledged this indebtedness but had never repaid the loan. Thereafter, decedent lived on the farm with claimant until she died.

Initially, we must inquire into the *jurisdiction* of the Orphans' Court to entertain this proceeding. Of course, the court below had jurisdiction to entertain the petition for family exemption and for the distribution of decedent's assets without administration. However, the exceptions filed raised an entirely different issue before the court, i. e. the existence of a debt allegedly owed to the estate and, if such debt did exist, its present validity. To pass upon that issue did the court below have jurisdiction?

Nine decades ago, in *Appeal of the Harrisburg National Bank*, 84 Pa. 380, 384, 385 (1877), Mr. Justice (later Chief Justice) Sharswood stated: "It may be very clear that under the laws of Pennsylvania this fund belongs to the administrator. If so, it is simply a debt due to the estate. But what Act of Assembly has given the Orphans' Court jurisdiction to determine that question and order the debtor to pay the administrator or to pay into court—an order of court, to be enforced by attachment or execution? . . . It may be readily conceded, that the Orphans'

Court has all the power of a court of equity in regard to matters clearly within its jurisdiction. But the question recurs, was this a matter clearly within its jurisdiction? In the settlement of the administrator's account, they certainly could decide that this was an asset of the estate which the administrator ought to have collected, and if he had negligently lost it, could surcharge him with the amount. But surely it could not cite the debtor and enter a decree or judgment against him. That would be to draw into [the Orphans' Court] . . . the trial and determination of all claims by decedents' estate against the third person. . .". In *McGovern's Estate*, 322 Pa. 379, 186 A. 89 (1936) this Court held that the Orphans' Court has no jurisdiction to compel a third person, not associated with the administration of the estate, to pay over money or property in the possession of the third person to the estate where the money or property was not in the decedent's possession when he died, or subsequently in the possession of decedent's representative and that, under such circumstances, decedent's personal representative must seek his remedy by action at law or in equity. See also: *Brown's Estate*, 343 Pa. 230, 22 A. 2d 821 (1941); *Moreland Estate*, 351 Pa. 623, 632, 42 A. 2d 63 (1945).

The Orphans' Court Act of 1951, as amended, (Act of August 10, 1951, P. L. 1163, art. III Section 301, as amended, 20 P. S. Section 2080.301 (1), (13), gives to the Orphans' Court not only exclusive jurisdiction of the "administration and distribution of the real and personal property of decedent's estates" but also the "adjudication of the title to personal property in the possession of the personal representative, or registered in the name of the decedent or his nominee, or alleged by the personal representative to have been in the possession of the decedent at the time of his death." See: *Webb Estate*, 391 Pa. 584, 586, 587, 588, 138 A. 2d 435 (1958); *Trout v. Lukey*, 402 Pa. 123, 126, 127, 166 A. 2d 654 (1961); *Ellis v. Ellis*, 415 Pa. 412, 417, 203 A. 2d 547 (1964). The factual situation presented in the case at bar indicates that the debt alleged to be owed to the estate falls in none of the several categorical

situations over which the Orphans' Court is vested with exclusive jurisdiction by statute. Moreover, the factual situation is not one where the statute gives the Orphans' Court concurrent jurisdiction: Orphans' Court Act of 1951, as amended, supra, art. III, §302, 20 P. S. §2080.302.

That this question of jurisdiction was not raised in the court below is of no moment for such question may be raised for the first time at the appellate level. See: *Patterson's Estate*, 341 Pa. 177, 19 A. 2d 165 (1941) and authorities therein cited.

In the factual posture in which this matter was presented the court below before it could pass upon the claimant's petition had to resolve the question whether the claimant was indebted to the estate. Since jurisdiction to determine the existence or validity or a debt allegedly due to the estate was not in the Orphans' Court[3] the court below exceeded its jurisdiction in determining that claimant was not a debtor of the estate.[4]

While we sympathize with the court below in its desire to expedite the disposition of this matter, unfortunately, the procedure adopted led to an excession of jurisdiction by the court and the record must be remanded to the court below. Determination of claimant's petition must await resolution of the issue whether the claimant was indebted to the estate and such question must be resolved in a tribunal other than the Orphans' Court.

Decree vacated and the record remanded to the court below for proceedings consonant with the views expressed in this opinion. Each party pay own costs.

Mr. Justice Roberts filed a dissenting opinion in which Mr. Chief Justice joins.

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[3] The right to a trial by jury is involved in this jurisdictional question.

[4] Whether or not the court below properly applied the statute of limitations is not before us in view of the court's lack of jurisdiction to determine the validity of the debt in the first instance. Upon the subject of the statute of limitations, see: Fiduciaries Act of 1949, Act of April 18, 1949, P.L. 512, §606, 20 P.S. §320.606; *Logan Estate*, 11 Fiduciary Rep. 81; (1960); *Deardorff's Estate*, 26 York 206 (1913).

DISSENTING OPINION

ROBERTS, J. FILED: March 14, 1967

I dissent from the majority's decision because I believe it has misconceived the jurisdictional issue involved in this case. While I believe that the majority is correct in its conclusion that the orphans' court has no jurisdiction to entertain an action to recover a debt claimed by a decedent's estate against another, that is not what the orphans' court decree necessarily entailed here. The effect of a decree such as the one below is to distribute the assets of a small estate without requiring the formality of a complete administration. Thus there is no reason why the determination by the court below that the debt claimed by appellant was not owing to the estate either insulates the alleged debtor from further legal action or prevents the appellant,* or any other proper person, from taking out letters and then proceeding against the debtor in the name of the estate.

The majority's holding is not compelled by the *Harrisburg Nat'l Bank*, *McGovern*, *Brown* or *Moreland* case relied upon by it. Each of those cases, as the majority's quotations suggest, merely reject the contention that the orphans' court has jurisdiction to enter a decree actually compelling a debtor to pay monies allegedly owed to an estate. That being so, I see no legal necessity or other reason why the orphans' court should not be held to have juristion to resolve the instant question, where such resolution is so clearly ancillary to and implicit in statutorily granted power. To decide that the administration of small estates may be frustrated by the mere prima facie claim of a debt owed the estate will not, in my view, be in the interests of efficient judicial administration.

MR. CHIEF JUSTICE BELL joins in this dissenting opinion.

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* I believe the court below was incorrect when it expressed the view that its order would, by virtue of res judicata principles, prevent appellant from prosecuting an action to recover the debt as representative of the estate.

APPENDIX C

PER CURIAM: 3-14-67 Order Affirmed.

PER CURIAM: 5-25-67 Petition Denied.

APPENDIX D

UNITED STATES CONSTITUTION

(Article XIV)

Citizenship Defined—Privileges of Citizens.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

IN THE

Supreme Court of the United States

October Term, 1967
No. 244

Office-Supreme Court, U.S.
FILED
JUL 7 1967
JOHN F. DAVIS, CLERK

OLGA NATOLI, *Petitioner*

v.

MARGARET K. HAMILTON,
WILBUR H. HAMILTON, JR.
CONTINENTAL BANK & TRUST CO.,
SUCCESSOR TO BROAD STREET TRUST CO.
and
THE ESTATE OF WILBUR H. HAMILTON, DECEASED,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

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Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO
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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Opinion of the Court of Common Pleas of Philadelphia County is unreported. A true and correct copy of such Opinion appears as Appendix A hereof.

The Opinion of the Supreme Court of Pennsylvania is reported at 424 Pa. 643. The Opinion of the Supreme Court of Pennsylvania respecting Petitioner's Petition For Reconsideration or to Vacate Order is unreported. A true and correct copy of the aforesaid Opinions appear as Appendix B hereof.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Is it repugnant to the provisions of either the Pennsylvania Constitution or the Constitution of the United States for a court of concurrent jurisdiction to defer, as a matter of comity, to the Orphans' Court of Philadelphia, which latter court first obtained jurisdiction over a creditor's claim against a decedent's estate?

STATEMENT

Petitioner, on June 1, 1966 instituted an action in Assumpsit against Respondent in the Common Pleas Court of Philadelphia County to recover from the Estate of Wilbur H. Hamilton the amount of an alleged loan made to the decedent by Petitioner during the lifetime of the decedent.

On February 28, 1966, *three months prior to the institution of the aforesaid action*, counsel for Petitioner presented the identical claim to the Respondents pursuant to the Fiduciaries Act of 1949, 20 P.S. §320.614, which provides:

> "(a) Written notice. Written notice of any claim against a decedent given to the personal representative or his attorney of record before the claim is barred shall toll the statute of limitations.
>
> (b) Acts equivalent to written notice. Any of the following acts by a claimant shall be equivalent to the giving of written notice of a claim to the personal representative:
>
> (1) Instituting proceedings to compel the filing of an account;

(2) Bringing an action against the personal representative in any court having jurisdiction of the claim and having the writ or pleading duly served on the personal representative;

(3) Substituting the personal representative as a defendant in an action pending against the decedent;

(4) Receiving a written acknowledgment by the personal representative or his attorney of record of the existence of the claim."

The account of the Executors was filed on April 19, 1966 and written notice of the filing of the account and of the date of the scheduled audit was sent to Petitioner pursuant to the requirements of the Fiduciaries Act of 1949, 20 P.S. §320.703, which provides:

"The personal representative shall give written notice of the filing of his account and of its call for audit or confirmation to every unpaid claimant who has given written notice of his claim to the personal representative or his attorney of record, and to every other person known to the accountant to have an interest in the estate as beneficiary, heir, or next of kin."

Petitioner's claim, though contested, was nevertheless submitted for adjudication to the Orphans' Court in such account.

Counsel for Petitioner appeared at the audit on the scheduled date and objected to such audit, which was, therefore, continued.

Respondents filed timely Preliminary Objections to Petitioner's Complaint in Assumpsit, which, after argument, were sustained by the Court of Common Pleas of Philadelphia County. (See: Appendix A).

Upon appeal the Supreme Court of Pennsylvania affirmed the order of the Court of Common Pleas in a Per Curiam opinion. (See: Appendix B).

Thereafter, Petitioner filed a Petition for Reconsideration or to Vacate Order (See: Appendix A of the Petition) and Respondents filed an Answer to such Petition, a true and correct copy of which appears as Appendix C hereof.

On May 25, 1967, in a Per Curiam opinion, the Supreme Court of Pennsylvania denied the aforesaid Petition. (See: Appendix B).

ARGUMENT

I. *The Decision of the Court Below Was Clearly Correct and Does Not Conflict With Any Prior, Contemporaneous, or Subsequent Decision of Such Court.*

The jurisdiction of probate courts in the Commonwealth of Pennsylvania is statutory. The Orphans' Court Act of 1951, 20 P.S. §2080.301 provides, inter alia, as follows:

> "The Orphans' Court shall have exclusive jurisdiction over: (1) the administration and disposition of the real and personal property of decedents' estates."

It is a well settled principle of law in Pennsylvania that the administration of the estate of a decedent is one indivisible judicial proceeding, from the grant of letters appointing the administrator until his discharge. *Webb Estate*, 391 Pa. 584, 590 (1958).

The scope of the Orphans' Court jurisdiction includes the power to determine all questions essential to the matters properly before it and it is exceptionally well qualified to determine claims of creditors. *Snyder's Estate*, 368 Pa. 393, 398 (1951); *Long's Estate*, 254 Pa. 370 (1916).

In *Long's Estate*, supra, the Court stated:

> "It is now the settled law, that the Orphans' Court has *exclusive* jurisdiction over all matters pertaining

to the settlement and distribution of estates, *including the claims of creditors*, next of kin and legatees. *Linsenbigler v. Gourley*, 56 Pa. 166, 172; *Dundas' Appeal*, 73 Pa. 474; *Mauser v. Kerper*, 102 Pa. 444; *Kings' Estate*, 215 Pa. 59." 254 Pa. at 374. (Emphasis supplied.)

As indicated in the opinion filed by the Court of Common Pleas, the Orphans' Court obtained jurisdiction over the claim which formed the basis for Petitioner's assumpsit action at least five and one-half weeks prior to the institution of the latter action in the Court of Common Pleas. (See: Appendix A, infra, p. 17.) *Sheehan's Estate*, 78 D. & C. 385 (1952).

Once such an account is filed with the Orphans' Court the jurisdiction and powers of that Court, both legal and equitable, become paramount to those of all other courts. Partridge & Remick, Pennsylvania Orphans' Court Practice, Vol. 6, §44.01(e), p. 10.

To permit a court of concurrent jurisdiction to undertake the determination of a creditor's claim against an estate, after jurisdiction has attached in the Orphans' Court and the claim has been submitted for adjudication would permit the parties to ride "the processes of the two courts like a circus equestrian astride two spirited horses at the same time." *Sheehan's Estate*, supra, at 387.

To permit such a situation to exist would be contrary to the principle of harmonious cooperation in our several courts, particularly in light of the fact that the litigants must ultimately abide the Orphans' Court's determination with respect to distribution of the assets of the estate. Orphans' Court Act of 1951, 20 P.S. §2080.301.

Moreover, even if a right to trial by jury on an issue of simple debt between *man and estate* is constitutionally protected, the order of the lower court in the instant case, dismissing Petitioner's Common Pleas Court action, did not foreclose such right, since Petitioner has the right to

demand a jury trial in the Orphans' Court. Act of July 14, 1961, 20 P.S. §2080.745.

Respondents suggest that, since Petitioner has never demanded such right in the Orphans' Court and that latter Court has never had the opportunity to pass upon Petitioner's request, the issue of denial of right to jury has not yet come into fruition and the present Petition is premature.

All that was decided in the Court below was that when a Court of competent jurisdiction acquires jurisdiction of the subject matter its authority continues, subject only to appellate authority, until the matter is finally and completely disposed of, and no court of coordinate jurisdiction is at liberty to interfere with its action. *Cleveland P. & A. R. Co. v. Erie*, 27 Pa. 380, 382-383 (1856); *Sprigg v. Commonwealth Title Ins. Co.*, 206 Pa. 548, 554 (1903); *Landis v. Landis*, 343 Pa. 252, 254 (1942); *Frews' Estate*, 340 Pa. 89, 91-92 (1940); *Criswell's Estate*, 334 Pa. 266, 271 (1939).

This doctrine of comity is particularly applicable where *only* the court first obtaining jurisdiction can administer full relief. *Wormley's Estate*, 67 D. & C. 616 (1949); *Princess Lida v. Thompson*, 305 U.S. 456 (1938).

Petitioner cannot draw any meaningful or relevant distinction between the instant case and *Princess Lida*, supra.

In the latter case this Honorable Court affirmed the decision of the Supreme Court of Pennsylvania in *Thompson v. Fitzgerald*, 329 Pa. 497 (1938) which held that where a court of coordinate jurisdiction has first undertaken the administration of the assets of an estate or other entity, that court is entitled to retain such jurisdiction to the end, without interference or hindrance on the part of any other court and such other courts of coordinate jurisdiction are disabled from exercising a like power.

Nothing which is stated in the cases cited in the Petition (i.e., *Holtz Will*, 422 Pa. 540 (1966); *Probst v. First*

National Bank of Williamsport, 73 D. & C. 317 (1950); *Malvestuto Estate*, 25 D. & C. 2d 686 (1962) required the Court below to come to any decision different from the one they reached or contrary to the holding of this Honorable Court in *Princess Lida*, supra.

In speaking of the comity doctrine and its importance the Court in the *Thompson* case, supra, stated:

> "This rule is essential to the orderly administration of justice and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subject and persons. The doctrine in question is not limited in its application to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, *administer trusts* (italics supplied by court) or liquidate insolvent estates, and in all other suits of a similar nature, where in the progress of the litigation, the court may be compelled to assume the possession and control of specific personal or real property. In cases of the latter kind, the rule is that the tribunal which first acquires jurisdiction of the cause by the issuance and service of the process is entitled to retain it to the end, without interference or hindrance on the part of any other court."

The views expressed by the Pennsylvania Court were reinforced by this Honorable Court in *Princess Lida*, supra, in which Mr. Justice Roberts stated:

> "We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought

to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property. The doctrine is necessary to the harmonious cooperation of federal and state tribunals." 305 U.S. at 466. See also: *Palmer v. Texas*, 212 U.S. 118 (1908); *United States v. Bank of New York & T. Co.*, 296 U.S. 463 (1935).

The application of the comity principle in probate matters is not of recent vintage. It has long been held that where a matter has been committed to the Orphans' Court, a court of concurrent jurisdiction will not entertain an action on the same issue. *Mauser v. Mauser*, 326 Pa. 257 (1937); *Landis v. Landis*, 343 Pa. 252 (1942); *Graham Estate*, 147 Pa. Super. 57, *aff'd* 346 Pa. 479 (1943).

In *Binenstock Trust*, 410 Pa. 425 (1963) the Supreme Court of Pennsylvania gave recent expression to the need for the doctrine of comity and considered the deference which one court of concurrent jurisdiction must give to another where the latter has first acquired jurisdiction. The Court stated:

> "It is well established that orderly judicial procedure dictates that the court which first acquires jurisdiction over a matter be permitted to decide all questions relating thereto. See *Thompson v. Fitzgerald*, 329 Pa. 497; 198 Atl. 58, (1938); *Wilson v. Board of Directors of City Trusts*, 324 Pa. 545; 188 Atl. 588 (1936). Our problem, therefore, becomes one of determining which court first acquired jurisdiction over the inter vivos trust." 410 Pa. at 430-431.

It is clear that the jurisdiction exercised over the assets of an estate by the Orphans' Court is an *in rem* jurisdiction. *Princess Lida v. Thompson*, supra; *Thompson v. Fitzgerald*, supra; Orphans' Court Act of 1951, 20 P.S. §2080.301.

Since the decision of this Honorable Court in *Princess Lida*, supra, the rule there enunciated has been justifiably relied upon by federal as well as state tribunals. See: *Gately v. Gately*, 316 F. 2d 585 (7th Cir. 1963); *Safeway Trails, Inc. v. Stuyvesant Insurance Co.*, 211 F. Supp. 227, 237 (M.D. No. Car. 1962); *Donovan v. Dallas*, 377 U.S. 408, 412 (1964).

Thus, it has been consistently held that sound judicial practice requires that the court first obtaining jurisdiction over the subject matter of an action, especially when such jurisdiction is *in rem* and the parties can obtain final satisfaction *only* in such court, should retain such jurisdiction without interference or hindrance on the part of any other court.

The determination of the court below, premised upon the foregoing principle of "sound judicial practice", was clearly correct and consistent with all prior, contemporaneous, and subsequent decisions of such court and this Honorable Court.

For this reason alone the Petition is completely devoid of merit and should not be granted.

II. *Petitioner Is Not Entitled to a Jury Trial as a Matter of Constitutional Right, but in Any Event Such Right, If It Exists, Has Not Been Violated.*

The question presented by Petitioner in her second argument is simply: Does a constitutional right to trial by jury exist as to a claim made on a simple debt by a creditor *against the estate of a decedent?*

Due process does not require a jury trial in all classes of actions. Article I, Section 6 of the Pennsylvania Constitution of 1874 preserves only the right to trial by jury in those cases where it existed at the time the Constitution was adopted. *Pa. P. U. C. v. W. J. Dillner Transfer Co.*, 191 Pa. Super. 136 (1960); *Fleming's Estate*, 265 Pa. 399, 407, 408 (1919); *Teacher v. Kijurina*, 365 Pa. 480 (1950); *Allen v. Biggs*, 62 F. Supp. 229 (E.D. Pa. 1945).

The dismissal of a complaint on proper grounds is not tantamount to a denial of a trial by jury. In *Allen v. Biggs*, supra, Judge Ganey said at page 230:

> "There is now no doubt whatever that a trial court's dismissal of a complaint, which is not well founded, . . . is not violative of the Seventh Amendment. As is stated in 31 American Jurisprudence, 561: 'The right (to jury trial) does not exist with respect to a complaint or declaration as to which a dismissal or non-suit is proper or with respect to facts as to which there is no traverse and as to which the defendant has defaulted. . . .' The right to trial by jury thus preserved is the right which existed under the English common law when the amendment was adopted."

So also as to Article I, Section 6 of the Pennsylvania Constitution; it was not intended to extend the right of trial by jury, but merely to preserve the right as it existed at the time of the foundation of our state government. *Pennsylvania Publications v. Pa. P.U.C.*, 152 Pa. Super. 279 (1943); *Comm. v. Wesley*, 171 Pa. Super. 566 (1952).

Petitioner cannot claim any greater right under the Seventh Amendment to the Federal Constitution, which simply makes the same preservation, and moreover has no application to actions brought in state courts. *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211 (1916).

In the *Bombolis* case, supra, this Honorable Court stated:

> "The one question to be decided is therefore reduced to this: Did the 7th Amendment apply to the action of the state legislature and to the conduct of the state court in enforcing at the trial the law of the state as to what was necessary to constitute a verdict?
>
> "Two propositions as to the operation and effect of the 7th Amendment are as conclusively determined as is

that concerning the nature and character of the jury required by that Amendment where applicable. (a) That the first ten Amendments, including, of course, the 7th, are not concerned with state action, and deal only with Federal action. We select from a multitude of cases those which we deem to be leading: *Barron v. Baltimore*, 7 Pet. 243, 8 L. ed. 672; *Fox v. Ohio*, 5 How. 410, 434, 12 L. ed. 213, 223; *Twitchell v. Pennsylvania*, 7 Wall. 321, 19 L. ed. 223; *Brown v. New Jersey*, 175 U.S. 172, 174, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77; *Twining v. New Jersey*, 211 U.S. 78, 93, 53 L. ed. 97, 103. And, as a necessary corollary, (b) that the 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same. *Livingston v. Moore*, 7 Pet. 469, 552, 8 L. ed. 751, 781; *Supreme Justice v. Murray (Supreme Justice v. United States)* 9 Wall. 274, 19 L. ed. 658; *Edwards v. Elliott*, 21 Wall. 532, 22 L. ed. 487; *Walker v. Sauvinet*, 92 U.S. 90, 23 L. ed. 678; *Pearson v. Yewdall*, 95 U. S. 294, 24 L. ed. 436. So completely and conclusively have both of these principles been settled, so expressly have they been recognized without dissent or question almost from the beginning in the accepted interpretation of the Constitution, in the enactment of laws by Congress and proceedings in the Federal courts, and by state Constitutions and state enactments and proceedings in the state courts, that it is true to say that to concede that they are open to contention would be to grant that nothing whatever had been settled as to the power of state and Federal governments or the authority of state and Federal courts and their mode of procedure from the beginning." 60 L. ed. p. 963 241 U.S. at 217.

While Petitioner cavalierly contends for a federally guaranteed right to jury trial in a state court proceeding, she cites no authority for the proposition and has completely overlooked the wealth of authority which is directly contrary to her position. See, e.g., 5 Moore, Federal Practice, pg. 77; Dennis, Jury Trial and the Federal Constitution (1906); *Gustafson v. Peck*, 216 F. Supp. 370 (N.D. Iowa 1963); *Fay v. New York*, 332 U.S. 261, 288 (1947); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *U.S. ex rel. Tillery v. Cavell*, 294 F. 2d 12 (3rd Cir. 1961), cert. denied 370 U.S. 945 (1962).

Petitioner's completely unsupportable reliance upon the provisions of the Constitution of Pennsylvania hold her in no better stead.

Section 11 of the Declaration of Rights contained in the first Pennsylvania Constitution of 1776 gave the right to a jury trial only in "controversies respecting property, and in suits *between man and man.*" This provision refers to civil actions only. *Commonwealth v. Kramer*, 146 Pa. Super. 91 (1941).

Section 25 of the 1776 Constitution provided that jury trials were to be "as heretofore" and applies generally to criminal and civil cases. *Commonwealth v. Kramer*, supra.

The Constitution of 1790 states only that the right to trial by jury will be as heretofore. Prior to 1790 the right was applicable to criminal cases and civil actions respecting property or suits *between man and man.*

Thus, at the time the 1874 Constitution was adopted the only right to trial by jury was in criminal cases and civil actions involving controversies respecting property or claims *between man and man.*

By quoting at length from the annotations in Purdon's Statutes, Petitioner comes to the conclusion that even prior to 1776 there was a right to trial by jury in actions of debt. Petitioner has actually cited no authority for the aforesaid legal conclusion. Even if it was agreed that such right did exist as relates to controversies between

man and man, that is not the issue under consideration. Petitioner has cited no case which holds that prior to 1776 *a creditor of a decedent's estate* had a right to have his claim of debt presented to a jury.

All of the cases cited by Petitioner are distinguished from the instant case; are not responsive to the question here involved; and are inapposite.

The cases of *Orban v. Rothrock*, 19 D. & C. 2d 336 (1959), and *Probst v. First National Bank of Williamsport*, 73 D. & C. 317 (1950), do not treat at all of the question here involved. In neither case does the court concern itself with the issue of the right to trial by jury in a claim against a decedent's estate. Both cases address themselves only to the question of concurrent jurisdiction.

Nowhere in *Probst*, supra, does the court consider the issue here involved, and, to the extent that it relied upon the existence of a right to trial by jury as a basis for its holding that a common pleas court had concurrent jurisdiction of a claim against a decedent's estate, it was in error.

Although Respondents disagree with the holding of the case even as respects the question of concurrent jurisdiction, it is submitted that the court in *Probst* considered only the latter issue and any reference to the right to trial by jury was merely poorly chosen and unsupported dicta.

In the case of *Low v. Ahlquist*, 28 Lehigh County Law Journal 455, *an estate was bringing the action as opposed to a creditor suing an estate.* Giving the decision even the broadest effect, it is not responsive to the issue here involved and is completely inapposite.

Nor did *Lackawanna Ice Co. v. Weingartner*, 328 Pa. 362 (1938), cited by the court in *Low*, deal with a claim *against a decedent's estate.* The question of title to real property was there involved, a question always determined by a jury at common law.

In *Rybak Appeal*, 424 Pa. 470 (1967) the Supreme Court of Pennsylvania merely restated a familiar prin-

ciple of law so often enunciated by it and other state courts in the past: to wit, *when an estate makes a claim against a third party* jurisdiction lies only in the common pleas courts because such third party is not initially within the orbit of the Orphans' Court's power *unless he submits himself thereto. McGovern's Estate*, 322 Pa. 379 (1936); *Brown's Estate*, 343 Pa. 230 (1941); *Moreland Estate*, 351 Pa. 623 (1945).

Such decision did not comment upon, rule upon, or even hint that in suits *by claimants against an estate* the Orphans' Court should be ousted of jurisdiction which it first obtained.

Moreover, since Petitioner's reliance on her claim that her constitutional right to trial by jury has been infringed is dependent, under the cases, upon her showing that she was entitled to such right at common law, it is significant that she has cited no cases which indicate that she would have had a right to trial by jury at common law in an action for the recovery of a simple debt from a decedent's estate. Our own research discloses that in the absence of statutory authority therefor, there is no right to a jury trial in a probate court. Probate courts have always proceeded without the intervention of a jury and are not within the application of the constitutional provisions relating to the right to a trial by jury: 50 C.J.S. Section 13, p. 727, Section 55, p. 763.

It appears that the power to administer a decedent's estate in England, was divided between the ecclesiastical courts and the secular courts with the church courts administering the personalty of the deceased, while the secular courts administered the real estate: 3 American Journal of Legal History, 125 et seq. After the Reformation, parliament abolished the church courts and transferred the jurisdiction of estates to courts of chancery.

Following the passage of the Act of April 22, 1856, the Orphans' Court had control over realty and personalty. The net effect of this Act was that the probate of a will devising real estate could not be collaterally attacked in

a common law action of ejectment or trespass: *Wilson v. Gaston*, 92 Pa. 207 (1879). And although prior to 1919 it was believed that there was a right to trial by jury on the issue of a validity of a writing purporting to be a will, the court in *Fleming's Estate*, 265 Pa. 399 (1919) held that such right did not exist. Under the Orphans' Court Act of 1951, the empaneling of a jury on such issue is discretionary only: 20 P.S. 2080.745.

In *Marchiafava Estate*, 32 D. & C. 2d 5 (1964), a guardian argued that he was entitled to a jury trial as a matter of right as against a claim of the Commonwealth for monies it expended for the dependent child's assistance. After the matter was heard by the Orphans' Court en banc, in an opinion by President Judge Klein, he said:

> "We are of one mind that this contention is completely devoid of merit. Although counsel for the guardian cavalierly states that his client would have been entitled to a trial by jury to pass on the merits of the Commonwealth's claim, he furnishes no reliable support for his contention. He would have us destroy a judicial system which has been functioning effectively and satisfactorily for countless years. . . . It is, therefore, clear that the Orphans' Court has complete authority to dispose of all issues of fact arising in the course of any proceeding properly before it, with or without the assistance of a jury and issues need no longer be sent to the law courts for determination."

It is respectfully submitted that there is no authority indicating that on claims for simple debt against a decedent's estate in common law courts, a claimant was entitled to a jury trial. On the contrary, it would appear that such courts as passed on claims for debts of decedents passed judgment thereon without the benefit of a jury: *Sharp's Appeal*, 3 Grant 259; *In Re: Beehler's Estate*, 3 Phila. 254.

In summary, Petitioner has failed to cite a single authority for the proposition for which she contends and

the cases herein cited al lead inexorably to the conclusion that no right to jury tri l existed either at common law or exist under the Pennsyl ania Constitution or the Federal Constitution in actions b claimants against a decedent's estate.

Moreover, there is conflict in the decisions of the Supreme Court of Penns lvania on the question here presented, which decisions re consistent with those of this Honorable Court.

Finally, the question aised by Petitioner is not a substantial federal question nd is premature in any event since Petitioner has not, ven as of this date, demanded a jury trial in the Orphan Court and that latter court has not had an opportunity t pass upon any such request.

CONCLUSION

For the foregoing r asons, it is respectfully submitted that the petition for a rit of certiorari should be denied.

Respectfully submitted,

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APPENDIX "A"

OPINION IN ACCORDANCE WITH RULE 63 OF THE PENNSYLVANIA SUPREME COURT

CHUDOFF, *J.* September 23, 1966

On June 1, 1966, the plaintiff, Olga Natoli, instituted an action in assumpsit in the Court of Common Pleas of Philadelphia County against the Executors of the Estate of Wilbur H. Hamilton, deceased. On June 10, 1966, defendants filed Preliminary Objections, questioning the jurisdiction of the Common Pleas Court over the subject matter. Argument was heard by the court on July 26, 1966, and dismissed the following day.

Wilbur H. Hamilton died on July 22, 1964, and on August 13, 1964, letters testamentary were granted to his executors. Plaintiff alleges that prior to decedent's death she had made two loans to him, one in the amount of $10,000.00 and another in the amount of $15,000.00, both of which remained unpaid at his death. On February 28, 1966, plaintiff, through her attorney, presented her claim to the executors of decedent's estate. The claim was denied by the executors but was submitted to the Orphans' Court for adjudication when the account was filed on April 19, 1966.

On May 23, 1966, plaintiff was notified that the account would be called for audit on June 6, 1966, before the Honorable Kendall H. Shoyer. On that date counsel for plaintiff appeared before the Orphans' Court to inform Judge Shoyer that a suit in assumpsit had been instituted in the Common Pleas Court of Philadelphia County on June 1, 1966, to recover the alleged debt. The audit was continued to allow the Court of Common Pleas to determine the question of jurisdiction.

In essence, defendant contended that the Orphans' Court Act of 1951 gave exclusive jurisdiction over the claims of creditors against an estate to the Orphans' Court and that even if there were concurrent jurisdiction with the Court of Common Pleas, comity would require us to defer to the Orphans' Court.

Plaintiff asserted that there was concurrent jurisdiction between the two courts and that she had an absolute right to either select her forum or to proceed in both.

The Orphans' Court has exclusive jurisdiction over all things pertaining to the settlement and distribution of estates: *Long's Estate*, 254 Pa. 370 (1961); but the Orphans' Court does not possess exclusive jurisdiction in the proof of claims of decedent's creditors. *Commonwealth to use v. Easton Trust Co.*, 347 Pa. 162 (1943). While these points appear superficially inconsistent, a close analysis leads to a logical conclusion. Apparently, either the Orphans' Court or the Common Pleas Court may consider the validity of a debt, but only the Orphans' Court may determine how a debt is to be included in the distribution of any estate.

Notwithstanding the existence of concurrent jurisdiction over the subject matter, sound judicial practice would preclude the possiblity of proceeding on the same claim in two courts. In the words of the Honorable Charles Klein, it would be as parties, "riding the processes of the two courts like a circus equestrian astride two spirited horses at the same time." In *Sheehan's Estate*, 78 D. & C. 385 (1952).

The rule of comity would dictate that the court which first entertained the proceeding ought to retain control of the matter until its conclusion. Thus, the problem resolved into determining which court first acquired jurisdiction. Obviously, the Common Pleas Court entered the picture on June 1, 1966, the date on which plaintiff filed her complaint.

At what point the issue came before the Orphans' Court is more difficult to discern. In Sheehan's Estate,

supra, President Judge Klein stated that the Orphans' Court acquired jurisdiction when the administrator's account was first called for audit. However, Judge Klein's remarks were not stated as a general principle but were carefully limited to that particular case. Nonetheless, his words did suggest that the Orphans' Court would obtain control no later than the date on which audit was called. Pennsylvania Orphans' Court Practice, an accepted authority, states that once an account has been filed in the Orphans' Court the jurisdiction and the powers of that court, both legal and equitable, become paramount to those of other courts. *Pennsylvania Orphans' Court Practice*, Partridge-Remick, Vol. 6, §44.01(e).

This view was persuasive with the court because the filing of an account most readily compares to the filing of a complaint. It is at this point in both procedures that the controversy first comes under the control of a court. Therefore, we concluded that the Orphans' Court first acquired jurisdiction on April 19, 1966, the day on which the account was filed, approximately five and one-half weeks before plaintiff instituted suit in Common Pleas Court. Following the rule of comity we deferred to the Orphans' Court.

Moreover, we did not believe that plaintiff's argument that she would be denied her right to a jury trial in Orphans' Court was timely made. The Orphans' Court has the power to grant a jury trial in proper instances and should plaintiff be denied a jury she may raise this issue at that time. Meanwhile, she will have the benefit of a court which the Pennsylvania Supreme Court said, ". . . is by custom and experience exceptionally well qualified to determine the claims of creditors . . ." *Snyder's Estate*, 368 Pa. 393 (1951).

For the foregoing reasons the court allowed defendants' preliminary objections.

By THE COURT:

/s/ CHUDOFF, *J.*

APPENDIX "B"

OPINION PER CURIAM, MARCH 14, 1967
ORDER AFFIRMED

OPINION PER CURIAM, MAY 25, 1967
PETITION DENIED

APPENDIX "C"

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

APPELLEES' ANSWER TO APPELLANT'S PETITION FOR RECONSIDERATION OR TO VACATE ORDER

To the Honorable the Chief Justice and Justices of the Supreme Court:

1. Denied as stated. Appellant appealed from a determination of the Court of Common Pleas of Philadelphia County sustaining Defendants' Preliminary Objections to her Complaint in Assumpsit on the ground that the Orphans' Court had first acquired jurisdiction over the subject matter of the dispute and that the rule of comity required that the matter remain in the Orphans' Court. The Court of Common Pleas also held that Appellant had not been denied her right to trial by jury if one in fact existed since she had not requested such right from the Orphans' Court.

2. Admitted.

3. Denied as stated. The opinion of this honorable court being in writing speaks for itself.

4. The opinion of this honorable court being in writing speaks for itself.

5. The opinion of this honorable court being in writing speaks for itself.

6. Denied. The court in the Estate of Eva Rybak reaffirmed the principle that a claim *by* an estate *against* a third party must be commenced in the Court of Common Pleas whereas in Natoli v. Hamilton this court held that a

claim by a third party against an estate should be commenced in the Orphans' Court and that once jurisdiction attached in the Orphans' Court, the principle of comity operated to preclude subsequent litigation in any other court. Appellant again ignores the Rules of the Supreme Court of Pennsylvania. Rule 71 of the Supreme Court requires that a Petition for Reargument must be filed within ten days after the final order, judgment or decree of the Supreme Court. The final judgment of the Supreme Court in Natoli v. Hamilton was March 14, 1967, the same date on which this honorable court decided the Estate of Eva Rybak, and it is manifest that Appellant's request for reargument has not been timely made.

Appellant has again raised the question of the right to jury trial. This question was raised in the Court of Common Pleas, and in Appellant's brief and argument before the Supreme Court of Pennsylvania. It is submitted that this issue has already been carefully considered by the lower court and the Supreme Court and decided adversely to Appellant.

7. Denied as stated. The opinion of the Superior Court being in writing speaks for itself and the issues there considered were and are irrelevant and immaterial to the issue presented to this court in Natoli v. Hamilton.

WHEREFORE, Appellees, by their attorney, Francis W. Sullivan, respectfully request this Court to dismiss Appellant's Petition.

Respectfully submitted,

FRANCIS W. SULLIVAN,
Attorney for Appellees.